IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12055 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GOPIRAJ DEDRAJ AGRAWAL (GOPIRAM TUDRAJ AGRAWAL)

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 12055 of 2003

MR JITENDRA M PATEL for Petitioner No. 1-6/1

Ms. Falguni Patel, AGP for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 19/09/2003

ORAL JUDGEMENT

The petition is filed under Article 227 of the Constitution of India challenging the order passed by the Joint Secretary, Revenue Department (Disputes), State of Gujarat, Ahmedabad, in Revision Application No. 46 of 1995 on 27.6.2003 whereby he has dismissed the revision application and set aside the mutation Entry No. 2526 dated 27.4.1984 inspite of the fact that in pursuance of the order of the Collector, Ahmedabad dated 5.12.1994,

Mamlatdar & ALT, Dascroi Taluka held the inquiry under Section 84-C of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short "the Tenancy Act") by registering Case No. 112 of 1994.

2. It is the case of the petitioners that the petitioners have purchased the land bearing Survey No. 1525/65 situated in the Sim of Village Ognaj from its owner Madhukantaben Asharam and others by Registered Sale Deed dated 17.10.1979. The said transaction of sale has been certified by the mutation Entry No. 1933 on 18.10.1979. There is another land bearing Survey No. 996/1 admeasuring 0 Acre, 21 gunthas situated in the sim of village Ognaj. The said land was originally belonged to one Bai Joiti, widow of Chaturbhai Patel. The said Bai Joiti executed the Will dated 2.12.1975 in favour of the petitioners giving the said land bearing Survey No. 996/1. It was also stated in the said Will that she has executed the said Will after obtaining consent of all the heirs. She had also given other properties to other heirs. The said Will was executed before the Deputy Mamlatdar, Collector's Office,Ahmedabad. In pursuance of the said Will, mutation Entry No. 2526 dated 27.4.1984 was made in the revenue record. Thereafter, notices under Section 135B of the Bombay Land Revenue Code were issued and all the heirs of the deceased Joitiben had given their statements to the effect that they were aware of the Will and they had no objection if the land was mutated in the name of the petitioners. They have also stated that the possession of land was of the petitioners since then. In view of this statement, the said mutation Entry was certified on 26.9.1984 by the revenue authority.

3. It is further stated that in the said village, there were two Joitiben. The said Joitiben expired after 1975 and another Joitiben expired on 23.8.1968, but it was treated that the present Joitiben has expired who had executed the Will in favour of the petitioners. It is further stated that on this erroneous premises, the Collector, Ahmedabad had initiated suo motu proceedings under Section 108(6) of the Bombay Land Revenue Rules for cancellation of the said Entry. The said case was registered as RTS Revenue Case No. 61/84, and after making inquiry, the Collector, Ahmedabad, by his order dated 28.11.1994 had cancelled the mutation Entry No. 2526 and he had given further direction to the Mamlatdar and ALT to initiate proceedings under Section 84-C of the Tenancy Act for breach of the provisions of the said Act.

4. Being aggrieved by the said order of the

Collector, the petitioners had preferred Revision application before the Secretary, Revenue Department (Disputes), being Revision Application No. 46/95. During the pendency of the said Revision Application, as per the directions contained in the order of the Collector dated 28.11.1994, the Mamlatdar & ALT initiated proceedings under Section 84-C of the Tenancy Act for the alleged breach of the provisions of Section 63 of the Tenancy Act by registering Tenancy Case No. 112/94. After examining the facts and circumstances of the case as well as after going through the several judgments of this Court as well as of the Hon'ble Supreme Court, the Mamlatdar and ALT came to the conclusion that the Will executed in favour of the petitioners was the genuine and proper Will and vide his order and judgment dated 26.4.1996 he withdrew the notice issued under Section 84-C of the Tenancy Act.

5. Being aggrieved by the said order of the Mamlatdar and ALT passed on 26.4.1996, the heirs of the deceased Joitiben filed an appeal, being Tenancy Appeal No. 97 of 1996 before the Deputy Collector, Ahmedabad, who vide his order and judgment dated 29.6.1996 dismissed the said appeal. Being further aggrieved by the said order of the Deputy Collector, dated 29.6.1996 the heirs of Joitiben filed an application under Sec. 76 of the Tenancy Act before the Gujarat Revenue Tribunal, being Revision Application No. TEN.BA.896 of 1996 and the Tribunal vide its order dated 6.3.1997 dismissed the said revision as withdrawn. The order of the Gujarat Revenue Tribunal has, thus, become final as it was not challenged either by way of review or by way of filing Special Civil Application before this Court.

6. Despite the aforesaid facts and outcome of the 84-C proceedings finalised by the Gujarat Revenue Tribunal, the Joint Secretary, Revenue Department (Disputes), has dismissed the Revision Application filed by the petitioners, vide its order dated 27.6.2003.

7. It is this order which is under challenge in the present petition filed by the petitioners under Article 227 of the Constitution of India.

8. Mr. JM Patel, ld. advocate appearing for the petitioners submits that in the mutation Entry No. 2526 dated 27.4.1984 it was stated that Smt. Joitiben expired about 8 years back and during her lifetime she had executed the Will dated 2.12.1975 in favour of the present petitioners. He has further submitted that it was nowhere recorded that Joitiben expired on 23.8.1968.

Even as per the Entry mutated in the Record of Rights, 8 years would relate back to the year 1976 and the Will was dated 2.12.1975 and therefore there was no illegality committed in execution of the said Will or the Entry mutated on the basis of the said Will. He has further submitted that the affidavit of son of deceased Joitiben was on record in which it was specifically stated that there were two Joitiben in the village and her mother has not expired on 23.8.1968, but expired after the execution of the Will. It was further stated in the said affidavit that the Will was executed after consultation and with the consent of the heirs of deceased Joitiben.

9. Mr. Patel has further submitted that the mutation Entry mutated on 27.4.1984 was sought to be revised by the Collector in the year 1994. No such powers can be exercised by the Collector after the period of about 10 years and hence the Collector's order is ex facie illegal, unlawful and contrary to the provisions of the Act and the Rules.

10. Mr. Patel has further submitted that during the pendency of the Revision Application before the Secretary, Revenue Department (Disputes), the 84-C proceedings initiated by the Mamlatdar and ALT, pursuant to the directions given by the Collector in his order dated 28.11.1994 were culminated upto the level of Gujarat Revenue Tribunal and they were decided in favour of the petitioners holding that the Will executed by Joitiben was real and genuine Will. He has, therefore, submitted that once the proceedings under Section 84-C of the Tenancy Act have been initiated against the petitioners and the authorities have found on merits that there was no justification in cancelling the Entry No. 2526 dated 27.4.1984 by the Collector, the Joint Secretary, ought to have cancelled the order passed by the Collector in suo motu proceedings initiated by him for cancellation of the Entry in question.

11. Mr. Patel has further submitted that even before the petitioners got the land in question bearing Survey No. 966/1 under the mutation Entry No. 2526 dated 27.4.1984, the petitioners were agriculturists of Village Ognaj, as, they have purchased the land bearing Survey No. 1526/65 of Village Ognaj in the year 1979. The said land was purchased by the petitioners by registered Sale Deed dated 17.10.1979 and the mutation Entry No. 1933 was made on 18.10.1979. The petitioners were therefore already agriculturists of the same Village Ognaj before the entry was made on the basis of Will executed by Joitiben on 2.12.1975 in favour of the petitioners. Mr. Patel has therefore submitted that apart from the Entry

in question, there was no breach of Section 63 of the Tenancy Act as the petitioners were already agriculturists of the same village.

12. Mr. Patel has further submitted that even the Will executed by Joitiben in favour of the petitioners is absolutely legal and valid and it is not contrary to any of the provisions of the Tenancy Act. He has further submitted that if the land has been given under the Will, then it cannot be said to be a transfer and hence there is no question of committing any breach of Section 63 of the Tenancy Act. In support of his submissions, he has relied on the following decisions of this Court :-

(1) Manharlal Ratanlal alias Radmansing Chausing v. Taiyabali Haji Mohmed & Others - 1967-68 Gujarat Law Times Vol.5 Page 199.

(2) Pravinbhai Bhailalbhai Gor vs. Rajivkumar Gupta, Collector, Vadodara - 1991 (1) GLR 440.

(3) Ghanshyambhai Nabheram v. State of Gujarat & Others - 1999(2) GLR 1061.

(4) State of Gujarat Vs. Pravinbhai Bhailalbhai Gor - 2000(3) GLR 2168.

On the basis of the aforesaid grounds as well as on the basis of the abovereferred judicial decisions, Mr. Patel has submitted that the order passed by the revisional authority is absolutely improper, illegal, invalid and contrary to the legal provisions and judicial pronouncements and hence it deserves to be quashed and set aside.

13. Ms. Falguni Patel, ld. AGP appearing for the respondents, on the other hand, has supported the orders of the authorities below. She has merely stated that the Collector, while passing his order dated 28.11.1994 has observed that Joitiben has expired on 23.8.1968, whereas the Entry was mutated on the basis of the Will dated 2.12.1975 and hence the said Will prima facie appears to be illegal and liable to be cancelled. She has further submitted that Joitiben, who has executed the Will, was of "Patel" community, whereas the beneficiaries of the Will are of "Agrawal" community and hence they cannot be considered to be the heirs of the deceased. The

petitioners have acquired the property on the basis of illegal document and hence the Joint Secretary, Revenue Department has rightly confirmed the view of the Collector and rejected the Revision Application. She has further submitted that this Court, while exercising its extraordinary writ jurisdiction under Article 226/227 of the Constitution of India, should not interfere with the orders passed by the authorities below and that too when concurrent finding is given by both the authorities.

14. After having heard the learned advocate, Mr. JM Patel appearing for the petitioners and the learned AGP, Ms. Falguni Patel appearing for the respondents and after having gone through the facts stated and averments made in the petition as well as the orders passed by the authorities below and the decisions relied upon by the respective parties, I am of the view that both the orders which are challenged in the present petition are based on certain erroneous factual premises and these orders were passed ignoring the relevant facts and considering the irrelevant materials resulted into miscarriage of justice. The Collector has exercised his suo motu revisional jurisdiction after the expiry of more than 10 years which cannot be said by any stretch of imagination to be a reasonable period and even on that ground also the Collector's action is not held to be just and proper. In this connection, it is worthwhile to refer the decision of this Court in the case of Evergreen Apartment Co-operative Housing Society Ltd. vs. Special Secretary (Appeals), Revenue Department - 1991 (1) GLH 155. In that case, the petitioner Society purchased the land in question in 1981 and subsequently also constructed tenements thereon. In 1985, Deputy Collector suo motu cancelled the Entry made in the record of rights in favour of the petitioner Society. On these facts, this Court has held that it was too late for the authority to create cloud on petitioner's title. This Court has, therefore, quashed and set aside the impugned orders passed by the Collector and the Additional Chief Secretary, Revenue Department by holding that the order was passed by the Deputy Collector after unreasonable delay. Here, in the present case, the mutation Entry was sought to be reversed after expiry of the period of more than 10 years and hence it cannot be said to be a reasonable period.

15. As far as the factual discrepancy, with regard to the name of Joitiben is concerned, it was explained at length by the Son of Joitiben in his affidavit and it was admitted by him that the Will was executed in consultation with the legal heirs and with the consent of

such legal heirs. It was also made clear in the said affidavit that there were two Joitiben in the said Village Ognaj and because of that this discrepancy arose. There was no reason for the authorities not to believe this version given by the deceased Joitiben's Son and to take any different view ignoring these material facts which have come on record.

16. The Revisional Authority has not taken into consideration at all the outcome of the 84-C proceedings which were initiated pursuant to the directions given by the Collector. After examining the entire facts and evidence and making proper inquiry in the matter, the Mamlatdar & ALT has withdrawn the notice issued for initiation of inquiry under Section 84-C of the Tenancy Act. The said order of the Mamlatdar & ALT was confirmed by the Deputy Collector and thereafter by the Tribunal and the matter has become final. It is very unfortunate that the Revisional Authority has not referred to the said proceedings at all in his order passed on 19.6.2003.

17. As far as the Entry mutated on the basis of the Will of Joitiben is concerned, there is settled legal position, and there is no need for this Court to make any deviation from the said settled legal position. This question was at length discussed in the decision of this Court in the case of Pravinbhai Bhailalbhai Gor Vs. Rajivkumar Gupta, Collector, Vadodara (Supra), wherein, after discussing the relevant provisions of the Tenancy Act as well as the Hindu Succession Act, the Court has taken the view that;

> "Testamentary succession is a permissible mode of succession in case of a death of a tenant who is Hindu. A will is not an instrument of transfer of property by sale, gift, exchange or mortgage or lease or assignment nor it is an agreement. It needs two living persons to make an agreement. It is the unilateral declaration of a person fixing his own line of succession to his estate on his demise. The will speaks as on the death of the testator and the succession takes place in accordance with the directions in the will. It is devolution of interest of deceased by succession in the nominated persons and not transfer of interest of a person in any of the modes of transfer prescribed, which all relate to transfer inter vivos. The will is not a document of transfer by way of sale, gift, exchange, mortgage, lease or assignment.....Neither Sec.

43 nor Sec. 63 envisages prior permission of any authority for executing a will that would take effect after the death of a person which he has right to vary, cancel or modify any time before his death, as many times as the testator desires."

After observing as above, this Court has held that "the very premise on the basis of which the learned Collector, Vadodara, had issued notice dated 29.11.1997 is on the face of it contrary to law and cannot be sustained." On this reasoning, the present suo motu proceedings initiated by the Collector for reversing the Entry mutated in the Record of Rights are on the face of it contrary to law and cannot be sustained.

18. It is worthwhile to mention here, that the same view was reiterated by this Court in the case of Ghanshyambhai Nabheram Vs. State of Gujarat & Others (Supra), wherein the petitioner, who was non-agriculturist, got the land under a Will and this Court has taken the view that a legatee can be a non-agriculturist, and he will succeed only to the interest of the deceased whether held by the deceased as individual or a joint tenant with other co-tenant, and resting of property in successor cannot be denied on the ground that he is non-agriculturist. In this context, the following observations made by this Court are very relevant :

"The laws do not provide any special mode of succession in respect thereof. In absence of special provision, the succession will be governed by personal law applicable to deceased. The deceased was a Hindu and succession to his interest on his death is governed by Hindu Succession Act which acknowledges both the modes of the succession, namely, testamentary and intestate. The result of death is that interest of deceased immediately vests in his successors whether recognised as heirs on intestate succession; or as per the direction in the will as legatees. Vesting is not postponed and is not as a result of any agreement or transaction inter vivos. It takes place by operation of law. It is not the case of the State Government that on the death of the tenant if he is a joint tenant of a block the succession would be in a different mode. It is also not the case of the State that if the Will had not been executed the land would

not have vested in the heirs of the deceased as per the law of inheritance applicable to deceased. It also cannot be doubted and disputed that only such interest shall vest in successor as was of the deceased. The position cannot be different in the nature of intestate succession and testamentary succession. In case of intestate succession also an heir may or may not be agriculturist. In case of one or more of heirs being non-agriculturist, he cannot be deprived of his inheritance. So also a legatee can be a non-agriculturist and he too will succeed only to the interest of the deceased whether was held by the deceased as individual or as joint tenant with other co-tenant. In either event, the vesting of the property in successor cannot be denied."

19. It is equally important to note of the fact that the order and judgment of the learned Single Judge in the case of Pravinbhai Bhailalbhai Gor Vs. Rajivkumar Gupta (Supra) has been confirmed by the Division Bench of this Court in the case of State of Gujarat Vs. Pravinbhai Bhailalbhai Gor (Supra). Though the said decision was confirmed on different grounds, the finding regarding devolution of interest on the basis of Will was not disturbed. Even with regard to the delayed proceedings initiated by the Collector in the present case are not held to be justified, in view of the following observations made by the Division Bench of this Court in the above case;

"Reasonable period would mean within a reasonable time and what will be the reasonable period in a given case would, obviously, depend upon the facts and circumstances of the case and the Court is obliged to consider the relevant facts and circumstances and for determining the expression 'reasonable period' in each case. In the present case, the delay has occurred for more than 8 years. Nothing has been successfully shown on behalf of the appellant original respondent, State of Gujarat, as to why the exercise of power under Rule 108(6) of the Rules is not done or is not taken in reasonable time or in other words, the reasons for inordinate delay for employing into the service the statutory powers of revision under Rule 108(6) of the Rules. In absence of such reasons, one thing is very clear that the period of delay of about 9

years by no stretch of imagination could be said to be reasonable period. This aspect itself goes to the root of the matter. Since the Court has found that the Collector has failed to exercise the discretionary power of revision against the impugned order of the revenue authority within a reasonable period, the impugned order of directing cancellation of the mutation entry in the name of the original petitioner could not be sustained."

20. Taking overall view of the matter, and considering the binding decisions of this Court, there is no hesitation on the part of this Court to hold that the orders passed by the Collector as well as by the Joint Secretary, Revenue Department (Disputes), are not sustainable in law and hence they deserve to be quashed and set aside. In the result, the petition succeeds. Rule is made absolute without any order as to costs.

rmr. [K.A. Puj, J.]